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ABSTRACT

This digest examines the constitutional framework guiding the use of race-conscious policymaking in K-12 education. Despite the requirements of Brown v Board of Education, recent court decisions suggest that desegregation remedies are becoming more limited, and voluntary policies will be subject to greater scrutiny. The legal framework governing racial policymaking in education reflects the intersection of two distinct bodies of law, one applying to court-ordered desegregation remedies flowing from the Brown decision, and the other applying to voluntary programs and policies that have been challenged as unconstitutional uses of race. The courts employ a two-part test under strict scrutiny, first evaluating whether a race-conscious policy advances a compelling governmental interest and second evaluating the fit between the policy and the interest being advanced. The paper concludes that the use of race in K-12 educational policy remains problematic. Policies that might be legal in one setting can be deemed unconstitutional in other settings. The law in this area continues to evolve as new policies are adopted and new cases litigated. The paper concludes with a list of cases cited. (SM)

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CONSTITUTIONAL LAW AND RACE-CONSCIOUS POLICIES IN K-12 EDUCATION

Nearly 50 years after the U.S. Supreme Court's decision in *Brown v. Board of Education*, the racial integration of our nation's public schools remains elusive. With the growth of immigrant populations and the movement of families from cities to suburbs, race relations have become very complex; the minority student population of many school districts is now the majority, and it is composed of three or more racial and ethnic groups.

Despite the mandates of *Brown* to desegregate schools with "all deliberate speed," many school districts that were once under court order to desegregate have been released from their obligations and are experiencing problems of resegregation (Orfield & Yun, 1999). Voluntary efforts to address racial isolation—efforts that are not required by a court or a settlement agreement—have been challenged as unconstitutional. Policymakers must grapple with the growing complexities of race and an uncertain legal landscape that may, ultimately, preclude the use of race-conscious measures in K-12 education.

This digest examines the constitutional framework that guides the use of race-conscious policymaking in K-12 education. Despite the requirements of *Brown*, recent court decisions suggest that desegregation remedies are becoming more limited and that voluntary policies will be subject to greater scrutiny by the courts.

The Constitutional Framework

The legal framework governing racial policymaking in K-12 education reflects the intersection of two distinct bodies of law. One body of law applies to court-ordered desegregation remedies flowing from the *Brown* decision. The other applies to voluntary programs and policies that have been challenged as unconstitutional uses of race.

Desegregation Remedies

The *Brown v. Board of Education* decision made clear that segregation in education is unconstitutional. In *Green v. County School Board*, the Supreme Court held that segregated systems must be dismantled "root and branch," so that desegregation is achieved among several factors affecting educational quality, including student body composition, facilities, staff, faculty, extracurricular activities, and transportation. The "*Green* factors" have been used to craft desegregation remedies and to measure whether a district has achieved "unitary status," a signal that court supervision is no longer required.

Throughout the 1960s and early 1970s, the Federal courts employed a variety of race-conscious remedies to desegregate the public schools, including busing, transfer policies, and magnet schools, as well as numerical goals for student enrollment. In *Swann v. Charlotte-Mecklenburg Board of Education*, for example, the U.S. Supreme Court struck down race-neutral student assignment plans that produced school segregation because of segregated housing patterns, and the Court approved busing as a remedy.

Beginning in the 1970s, however, the courts began paring back the scope of desegregation remedies. In *Milliken v. Bradley*, the Supreme Court ruled that the courts cannot, in most instances, impose an interdistrict remedy between a city and its suburbs in order to integrate the schools. (The Court did rule later in *Milliken*, however, that a court could order a state to pay for educational programs to repair the harm caused by segregation.)

In *Board of Education of Oklahoma v. Dowell*, the Court ruled that a district satisfying the *Green* factors could be declared unitary and freed from any affirmative obligations to end segregation. In addition, the Court held that government action recreating segregated schools would be presumed to be nondiscriminatory. In *Freeman v. Pitts*, the Court went further and ruled that the *Green* factors do not have to be met simultaneously for a system to be declared unitary; instead, a court could withdraw supervision over an aspect of desegregation, one step at a time. And in *Missouri v. Jenkins*, the Court found that "white flight" out of urban districts did not justify an interdistrict remedy such as magnet schools; moreover, districts did not have to demonstrate that the harms caused by segregation, such as lower minority student test scores, had been corrected in order to attain unitary status.

Because of the relaxed standards, districts throughout the country have been declared unitary and released from court supervision. An unfortunate consequence is that many systems are experiencing resegregation. For example, in the South, which achieved high levels of integration in the 1970s and 1980s because of court involvement, the percentage of black students in majority-white schools in the late 1990s dropped to levels last seen in the early 1970s; trends suggest that the percentage of black students in majority-white schools will continue to decrease (Orfield & Yun, 1999).

Voluntary Policies and "Strict Scrutiny"

In addition to court-ordered remedies to address segregated school systems, voluntary race-conscious policies are used to advance goals such as preventing racial isolation or promoting diverse student bodies. These policies, like all race-conscious policies, must comply with the equal protection clause of the Constitution and satisfy a high standard of review known as "strict scrutiny."

The courts employ a two-part test under strict scrutiny. First, courts evaluate whether a race-conscious policy advances a "compelling governmental interest." A compelling interest must be especially important; one example is remedying the present effects of a district's past discrimination. Second, courts evaluate the fit between the policy and the interest being advanced. A race-conscious policy must be necessary to achieve the compelling interest, and the courts typically require that a policy be "narrowly tailored" to serve that interest. For example, if a race-neutral policy could advance an interest as well as a race-conscious policy, then the race-con-

scious policy is not narrowly tailored. The two requirements are discussed below.

Compelling Interests. The courts have widely recognized that remedying the present effects of an institution's past discrimination is a compelling interest. There must, however, be a "strong basis in evidence" to prove the effects of past discrimination. It is not enough that a district assert that there has been discrimination. The district must provide evidence of the discrimination, and document its harmful effects through concrete evidence, which can include testimony, written documents, and statistical evidence of racial disparities. The Supreme Court has also ruled that remedying *societal* discrimination, compared to an institution's own discrimination, is not sufficiently compelling, because it is too broad and general (*City of Richmond v. J.A. Croson Co.*).

Whether a *non-remedial* interest can be a compelling interest is a source of conflict in the Federal courts. Several non-remedial interests have been challenged, with mixed results. One court of appeals has ruled that "reducing racial isolation" is a compelling interest (*Brewer v. West Irondequoit Central School District*). However, a trial court in Ohio ruled that preventing racial isolation was not compelling because the district relied on a statistical analysis of how demographic trends might play out in the future (*Equal Open Enrollment Association v. Board of Education of Akron City School District*).

The promotion of "educational diversity" in higher education, an interest that was upheld by the Supreme Court in *Regents of the University of California v. Bakke*, has been advanced as an interest in K-12 settings. For example, race-conscious admissions policies for selective public schools have been justified by a *Bakke*-type interest in promoting diversity. However, the courts have not ruled squarely on the issue, largely because there have been recent challenges to the *Bakke* decision itself. A number of courts have assumed that an interest in promoting diversity is compelling, and then have gone on to strike down policies because they are not narrowly tailored.

Narrow Tailoring. Although the courts do not always apply the same test of narrow tailoring, they generally weigh several factors, such as the necessity of the policy, the availability of alternative race-neutral policies, the duration of a policy, the relationship between numerical goals and the relevant student population, the flexibility of the policy, and the burden imposed by the policy on third parties (*United States v. Paradise*).

The narrow tailoring inquiry has become increasingly important because several courts have assumed that interests such as a *Bakke*-type interest in diversity are compelling, and then struck down policies as not being narrowly tailored. These courts characterize voluntary policies as forms of "racial balancing" that are inadequate alternatives to race-neutral policies and impose too great a burden on non-minority students (*Eisenberg v. Montgomery County Public Schools; Tuttle v. Arlington County School Board; Wessman v. Gittens*). One court, however, has upheld a voluntary interdistrict transfer policy on narrow tailoring grounds, finding that "there is no more effective means of achieving [the goal of reducing racial isolation] than to base decisions on race" (*Brewer v. West Irondequoit Central School District*).

Except for remedial cases, the courts will not uphold quotas or set-asides as narrowly tailored. However, a plan that does not use race in a rigid or mechanical way and is a well-considered alternative to a race-neutral policy is more likely to satisfy strict scrutiny. Much like the higher education admissions policy upheld in *Bakke*, K-12 policies that employ race along with other relevant factors (such as socioeconomic background or geographic ties) may stand the best chance of being upheld by the courts.

Reconciling the Law

The use of race in K-12 educational policy remains problematic. Policies that might be legal in one setting (racial balancing to remedy past segregation) can be unconstitutional in other settings (the same policies employed in a voluntary context). The law in this area continues to evolve as new policies are adopted and new cases are litigated. The Supreme Court has chosen not to take up appeals from the recent K-12 cases challenging voluntary race-conscious policies, but as cases percolate in the lower courts, the Court may ultimately take an appeal and provide greater guidance to the courts and to policymakers. The Court is also likely to revisit its decision in the *Bakke* case, and should provide direction for K-12 policymakers. But until the Supreme Court does provide definitive guidelines, the use of race in K-12 education will remain uncertain.

—Angelo Ancheta,
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